No. 83-1894

In The

Supreme Court of the United States

October Term, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION—A RESPONDENT

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QUESTION PRESENTED

Are employees unlawfully restrained in the exercise of their statutory right to refrain from concerted activity by a union constitutional provision which denies the employees the freedom to resign from union membership during a strike or when a strike is imminent and thus escape the union rule, enforceable by court collectible fines, which prohibits the return of members to work during a strike?

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SUMMARY OF ARGUMENT

The union argues that the proviso of Section 8(b) (1) (A) of the National Labor Relations Act (NLRA) authorizes the union to invalidate an employee's resignation from membership and therefore prevent his escape from fines

imposed to restrain the employee from crossing a picket line. The union position is not supportable.

1. The NLRA, as amended by the Labor-Management Relations Act, was enacted to protect the right of individual employees in their relations with both unions and employers. This is clearly stated in the Congressional Declaration of Purpose and Policy, 29 USC 141(b), and recognized by the courts. *Mosher Steel Co. vs. NLRB,* 568 F2d 436, 442 (5th Cir. 1978).

2. Congress has firmly imbedded into the NLRA, as a national policy, the right of the individual employee to resign from union membership. Section 7 NLRA, 29 USC 157 clearly states that employees have the right to refrain from any or all union activities. This right is recognized by the courts. Congress made only one exception: by union-management agreement an employee can be required to pay dues and an initiation fee. Section 7, Section 8(a) (3) NLRA. There are no other exceptions. There are no limitations.

The union's reliance on the proviso of Section 8(b) (1) (A) is not well placed. The proviso permits the union to fix standards for admission to the union and fix requirements which must be met (payment of dues, attendance at meetings, etc.) to retain membership. Failure to meet such requirements can result in expulsion. Nowhere does the Act empower a union to force an employee to continue membership by refusing to honor a resignation at any time.

The use of the words "acquisition or retention" in Section 8(b) (1) (A) and the words "acquiring or retaining membership" in Sections 7 and 8(a) (3) demonstrate that Section 8(b) (1) (A) does not authorize the union to

force an employee into involuntary membership subject to the union's discipline.

The accepted meaning of the word "retain" does not support the union's position.

Neither is there any support for the union's position to be found in the Legislative History. Senator Taft explained that "the right to refrain from any or all such activities" was added to Section 7 to make Section 8(b) (1) apply to the coercive act of unions against employees who did not wish to join or did not wish to participate in a strike or picket line. Later Senator Taft explained "all it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." Congressman Hoffman stated that Section 7(a) of the House Bill meant that employees would have the right to join or not join, to be bound by or not be bound by, union rules.

Although the House Bill in 1947 was more detailed, the House Conferees accepted the Senate Bill because it was "broader in its scope" of outlawing union unfair labor practices. The Conferees' Report explained that while they accepted the broader language in Section 8(b) (1), they insisted upon the explicit language of Section 7 guaranteeing the right to refrain from any and all union activity.

Nowhere in the Legislative History is there support for the union position.

3. The union's common law theory must give way to the provisions of the governing statute.

The union's "solidarity" theory has already been disposed of by this Court.

4. The decision of the Seventh Circuit in this case is consistent with the decisions of this Court. In *Allis-Chalmers*, 388 U.S. 175 (1967), this Court held that a union could discipline a full member and pointed out the distinction between a "full member" and a "financial core" member. In *Scofield*, 397 U.S. 423 (1969), this Court held that a union rule could be enforced only if it "• • • impairs no policy Congress has imbedded in the labor laws and is reasonably enforced against members who are free to leave the union and escape the rule." In *Granite State*, 409 U.S. 213 (1972), this Court stated "[W]hen there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street". In *Booster Lodge*, 412 U.S. 84 (1973), this Court said: "[W]e are no more disposed to find an implied post-resignation commitment from the strike-breaking proscription in the union's constitution here than we were to find it from the employees' participation in the strike vote and the ratification of penalties in *Granite State*."

The Court left open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. *Booster Lodge*, Id.

The Seventh Circuit faced that issue in this case and reasoning from this Court's decisions held that any union rule which denies its members the opportunity to resign during a strike, or when one is imminent, is invalid.

More recently the National Labor Relations Board, after reviewing the above decisions, concluded that any restriction placed by a union on its members' right to resign are unlawful. *Neufeld Porsche-Audi*, 270 NLRB No. 209, June 22, 1984, 116 LRRM 1257.

ARGUMENT

It is well established that a union may impose a court collectible fine upon a full member who violates a valid internal rule of the organization. *NLRB vs. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield vs. NLRB*, 394 U.S. 423 (1969). It is equally well established that a union may not impose a court collectible fine upon an employee who is not a member of the organization including an employee who has resigned from that membership to escape the consequences of the internal union rule. *NLRB vs. Textile Workers Local 1029, Granite State*, 409 U.S. 213 (1972); *Booster Lodge No. 405, I.A.M. vs. NLRB*, 412 U.S. 84 (1973).

The union now argues that the proviso of Section 8 (b) (1) (A) of the National Labor Relations Act (NLRA), 29 USC 158(b) (1) (A) authorizes the union to prohibit the resignation of an employee from membership during, or immediately before, a strike so that the employee is not free to escape the union rule prohibiting the crossing of a picket line but must remain subject to the restraint and coercion of a court enforcable fine for violating the union rule. The union argument would lead to the conclusion that under the proviso of Section 8(b) (1) (A) NLRA, a union may by rule require a member to remain a member for life. Indeed the union appears to so argue at pages 35-38 of the Brief for Petitioners. ("Pet. Br.")

The union's position is not supportable.

1. The protection of the rights of individual employees is an express purpose of Congress.

The NLRA was designed by Congress, in 1935, to protect the individual employee from the then unequal power of employers. In 1947 Congress adopted the Labor-Management Relations Act to amend the NLRA to protect individual employees from the growing excesses of labor unions. Congress clearly expressed its policy in its declaration of purpose and policy of the Labor-Management Relations Act. 29 USC 141(b) second paragraph:

> It is the purpose and policy of this Chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both *employees* and employers in their relations affecting commerce, * * * *to protect the rights of individual employees in their relations with labor organizations* whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, * * *. (Emphasis added)

Nowhere did Congress state a purpose for the benefit of labor unions. This case, therefore, must be judged in the light of the Congressional purpose "to protect the rights of individual employees in their relations with labor organizations". Labor Management Relations Act, 29 USC 141(b).

In *Mosher Steel Co. vs. NLRB*, 568 F2d 436, 442 (5th Cir. 1978) the Court expressed the will of Congress:

> (5) It is indisputable that the thrust of the NLRA is not the protection of the union, not the protection of the employer, but rather the protection of the employee. Thus, a decision that would operate to the disadvantage of the employee is, at minimum, to be avoided.

2. The right to resign from union membership is a Congressional policy firmly imbedded in the NLRA.

Section 7 of NLRA, 29 USC 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a) (3) of this Title. (Emphasis added)

Section 7 of NLRA is the heart of the Act. Standing alone it clearly fixes the right of each individual employee to be a union member or to refrain from being a union member. This Court has recognized this right to resign from membership. *NLRB vs. Textile Workers Local 1029, Granite State*, 409 U.S. 213 (1972); *Booster Lodge No. 405, I.A.M. vs. NLRB*, 412 U.S. 84 (1973).

The only exception is that union membership may be required as a condition of employment by agreement between employer and union—and this exception does not require "full membership" but only the payment of uniformly levied initiation fees and dues during the term of the union-employer agreement. Section 8(a) (3) NLRA, 29 USC 158(a) (3). If Congress had intended to give the union authority to require continued union membership it would have stated such an additional exception in Section 7. There is no exception. There is no limitation as to time.

The union, however, argues that the Section 8(b) (1) (A) proviso grants to the union the authority to require

continued membership so that once an individual employee becomes a member, he may not resign that membership and thus free himself from the discipline of the union. The words of the proviso clearly do not support the union's position.

Section 8(b) (1) (A) NLRB, 29 USC 158(b) (1) (A) provides that it shall be an unfair labor practice for a labor organization or its agents:

> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: *provided* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; • • •.

The proviso obviously permits a union to establish rules stating the conditions which must be met by an employee to acquire membership in the union. Typical of such conditions may be: payment of initiation fee; signing an application; progressing to journeyman status through an apprenticeship; passing a skill test (in certain skill trades); being eighteen (18) years of age or older; being licensed in a certain trade such as barber, truck driver, electrician, plumber, etc.

The proviso also obviously permits a union to establish rules which the member must meet if he wishes to retain his membership. Typical of such conditions may be: prompt payment of dues; attend regular membership meetings; display a union membership identification during working hours; maintain licenses required by law; honor a picket line; etc. In other words the member must continue to meet the requirements of the internal rules

if he wishes to *retain* his membership. If he fails to meet the union requirements, he may be unable to retain his membership—he may be expelled.

The proviso certainly does not authorize a union to establish a rule which forces a member to remain a member forever subject to the discipline of the union. Neither may it require him to remain a member during a particular period of time so that he will be subject to the discipline of the union.

Congress used the identical words in two (2) other subsections of Section 8 of the Act. Section 8(a) (3) permits the employer and the union to make an agreement which requires union membership as a condition of employment "Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization • • • (B) if he has reasonable grounds for believing that membership was *denied or terminated* for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of *acquiring or retaining membership.*" (Emphasis added) Section 8(b) (2), 29 USC 158(b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this Section or to discriminate against an employee with respect to whom membership in such an organization has been *denied or terminated* on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of *acquiring or retaining* membership." (Emphasis added) Congress used the word "retained" and "retaining" to mean

"to keep" in each of the three (3) paragraphs. There is no room to give any other meaning to the word.

The universally accepted meaning of the word "retain" is "to keep; to hold in possession". Clearly Congress used the word in its usual meaning. The union can establish rules which the member must meet in order to acquire and to retain—keep—his membership, not rules which require him to remain a member against his wishes and consequently subject to the discipline of the union.

Legislative History does not support the union's position. As a matter of fact, there is very little reference to the language here under consideration, but it does not support the union's position. The legislative history of Section 7 of the Act (29 USC 157) supports the contention of this Respondent. According to Senator Taft the phrase "the right to refrain from any or all such activities" was added to Section 7 of the Senate Bill to make the prohibition contained in Section 8(b) (1), 29 USC 158(b) (1) apply to coercive acts of unions against employees who did not wish to join or did not wish to participate in a strike or picket line. 93 Congressional Record 6859, II Legislative History 1623. After the proviso had been added to 8(b) (1) (A), Senator Taft also said that it "would not outlaw anybody striking who wanted to strike. • • • All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work". 93 Congressional Record 4436, II Legislative History 1207.

Obviously a union member wishing to return to work would be subject to the restraint and coercion of a union disciplinary rule prohibiting his return to work if at the

same time he was not free to resign that membership to escape the restraint and coercion of the disciplinary rule.

The union's attempt to place some significance to the fact that Section 8(b) (1) and (c) (4) of the House Bill was omitted from the Conference Bill is not supportive of the union's position. When HR 3020 came to the floor of the House, Congressman Hoffman said that the clear meaning of Section 7(a) language: "employees • • • shall also have the right to refrain from any or all such activities" meant that the employee would "have the right to join or not join, to be bound by or not be bound by, union rules". 93 Congressional Record 3572, 3612 (1947). Legislative History 669, 733. When HR 3020 passed the House, it also contained Section 8(b) (1) and 8(c) (4). Section 8(b) (1) made it an unfair labor practice "• • • to compel or seek to compel any individual to become or remain a member of any labor organization". Section 8(c) (4) made it an unfair labor practice for a union "(4) to deny to any member the right to resign from the organization at any time". Legislative History 51-53, 178-180. The Senate Bill, Section 8(b) (1) used broader terms making it an unfair labor practice "to restrain or coerce (A) employees in the exercise of their rights guaranteed in Section 7". Legislative History 226, 239. The conferees adopted the Senate Bill almost entirely. The House Conferees, however, considered their more detailed guarantee of the right to resign from membership to be contained in the broader Senate language, and therefore afforded even greater protection. "From the above description of the House Bill and the Senate amendment dealing with unfair labor practices on the part of labor organizations and their agents, it is apparent that the Senate amend-

ment was *broader* in its scope than the corresponding provisions of the House Bill". HR Conference Report No. 510, 80th Congress, First Section, 1, 7, 42-44 (1947). Legislative History 505, 511, 546-548. (Emphasis added). But the House did not just rely on this Conference Report. While it accepted the broader language of 8(b) (1), it insisted upon explicit language in Section 7 guaranteeing the right to refrain from any or all union activity. Senator Taft explained that the reason for the right to refrain language was:

> • • • that similar language had appeared in the House Bill and since Section 8(b) (1) of the Senate Bill, which was retained by the conferees, made it an unfair labor practice for a labor organization to restrain or coerce employees in the rights guaranteed them in Section 7, the House conferees insisted that there be express language in Section 7 *which would make the prohibition contained in Section 8(b) (1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line.* (Emphasis added) 93 Congressional Record 7000-7001 (June 12, 1947) Legislative History 1622-1623.

Senator Holland, in proposing the proviso language, described it as having to do with the "admission or the *expulsion* of members". (Emphasis added) 93 Congressional Record 4387, 4398, April 30, 1947, Legislative History 1129, 1139. In other words the union could adopt internal rules which a member must meet for retention of his membership and if he failed to comply with those rules he could be expelled from membership. It has nothing whatsoever to do with the right to refrain from or resign from union membership.

Nowhere in the Legislative History is there any statement to support the union position that under the proviso of Section 8(b) (1) (A) it can prohibit an individual employee from resigning from full membership at any time.

3. The union's common law and solidarity theories are not supportable.

The union's brief, pages 36-38, appears to abandon its reliance on the proviso of Section 8(b) (1) (A) and to theorize that the union has a common law right to adopt and enforce "League Law 13" prohibiting the resignation or withdrawal of a member during a strike or when one is imminent. The union overlooks or ignores the fact that the matter is governed by statute: the National Labor Relations Act, as amended. Section 7 of the Act (Section 29 USC 157) clearly provides: "Employees shall have the right to • • • join, or assist labor organizations, • • •, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3)". Section 7 clearly governs the right to join and to resign from membership.

The bottom line of the union's Brief (page 38) and the entire argument of the Amicus Curiae Brief of Teamsters For a Democratic Union is based upon the theories of mutual reliance and solidarity. Both theories have been disposed of by this Court.

This Court gave "little weight" to the mutual reliance theory in *NLRB vs. Textile Workers, Granite State,* 409 U.S. at 217.

In *Granite State,* Id. at 218, this Court stated that employees' "Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime". Burger, C.J. concurring, adds: "[T]he institutional needs of the union, important though they are, do not outweigh the rights and the needs of the individual".

4. The decision of the Seventh Circuit is consistent with and supported by the decisions of this Court.

In *NLRB vs. Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967) this Court held that the union did not violate Section 8(b) (1) (A) of NLRA when it levied and collected by court action fines against full members of the union who returned to work during a strike. In so doing the court pointed out that a union shop agreement under Section 8 (a) (3) and 8(b) (2) could require not full membership but only the tender of uniformly required initiation fees and dues. See also note 37. The court left open the question of whether or not the union could have imposed fines upon "financial core" employees.

In *Scofield vs. NLRB,* 394 U.S. 423 (1969) this Court held that a union rule imposing a ceiling on production for which its members would accept piece work pay is valid and that enforcement by fines did not violate Section 8(b) (1) (A). In *Scofield,* Id. at 430, the Court held that Section 8(b) (1) "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, *impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against members who are free to leave the union and escape the rule.*" (Emphasis added) To this the Court added, at 435: "If a

member chooses not to engage in this concerted activity and is unable to prevail on the members to change the rule, *then he may leave the union* and obtain whatever benefits in job advancement and extra pay may result from the extra work * * *". (Emphasis added)

In *NLRB vs. Textile Workers Local 1029, Granite State Joint Board,* 409 U.S. 213 (1972) this Court held that the union had violated Section 8(b) (1) (A) when it fined thirty-one (31) employees who, after participating in the strike vote and the resolution that fines be levied against anyone crossing the picket line, resigned their membership and returned to work. The Court stated: "*[W]hen there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street*". *Granite State,* Id. (Emphasis added) The concurring opinion of Chief Justice Burger added: "I join the Court's opinion because for me the institutional needs of the union, important though they are, do not outweigh the rights and the needs of the individual. * * * *Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership. Granite State,* Id. 218. (Emphasis added)

The Court outlined some events which may influence a member's decision and observed that the union had no rule specifically permitting or denying resignations from membership. *Granite State,* Id. 217-218.

In *Booster Lodge No. 405, I.A.M. vs. NLRB,* 412 U.S. 84 (1973) this Court found that the union violated Section 8(b) (1) (A) when it fined employees who resigned

from membership and returned to work during a strike, even though the union's constitution expressly prohibited members from returning to work during a strike. There was no constitutional provision permitting or forbidding such resignation. But the Court said "[W]e are no more disposed to find an implied post-resignation commitment from the strike breaking proscription in the union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in *Granite State*". *Booster Lodge,* Id. 89. "And here, as there (*Granite State*) we leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. *Booster Lodge,* Id. 88.

The Court below was confronted with that question, and the opening paragraph of its decision reads:

> The issue squarely confronting us is whether a union in its constitution may deny its members the opportunity to resign from the union during a strike or when a strike is imminent. The United States Supreme Court twice has acknowledged, but has not been required to decide, this issue. *Booster Lodge No. 405 vs. NLRB,* 412 U.S. 84, 88-90 (1973); *NLRB vs. Granite State Joint Board, Textile Workers Union, Lodge 1029,* 409 U.S. 213, 217 (1972). We find such a rule invalid.

In a recent decision the National Labor Relations Board reviewed the above decisions at length and concluded that any restrictions placed by a union on its members' right to resign are unlawful. *Machinists, Local Lodge 1414, Neufeld Porsche-Audi,* 270 NLRB No. 209, June 22, 1984, 116 LRRM 1257.

CONCLUSION

We submit that the union's League Law 13 (which prohibits the resignation of a member during a strike or when a strike appears imminent) impairs fundamental policies imbedded in the National Labor Relations Act by Congress; is contrary to the express language and consistent interpretation of Section 7, NLRA; illegally denies its members the freedom to leave the union and escape its discipline; and violates Section 8(b) (1) (A).

For the foregoing reasons we respectfully urge that the judgment below be affirmed.

Respectfully submitted,

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